

Exhibit 6

July 31, 2020 Hearing Transcript

SEALED TRANSCRIPT

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,)
)
 v.) Criminal No. 20-143
)
 ZACKARY ELLIS SANDERS,)
)
 Defendant.) Alexandria, Virginia
)
 _____)
 July 31, 2020

SEALED TRANSCRIPT

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE T. S. ELLIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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United States District Court
Eastern District of Virginia
401 Courthouse Square
Ninth Floor
Alexandria, Virginia 22314

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SEALED TRANSCRIPT

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 THE DEPUTY CLERK: Criminal Case United States of
4 America versus Zachary Ellis Sanders, case number
5 2020-CR-143.

6 May I have appearances please, first for the
7 government.

8 MR. CLAYMAN: Good morning, Your Honor. Bill Clayman
9 and Tony Roberts for the United States.

10 THE COURT: Good morning.

11 MR. JEFFRESS: Good morning, Your Honor. Jon
12 Jeffress and Jade Chong-Smith on behalf of Mr. Sanders.

13 THE COURT: All right. Good morning to you.

14 Mr. Sanders is present in the custody of the
15 marshals. This matter is proceeding under seal because
16 the substance of what is at issue involves, as I understand
17 it, both an ongoing investigation and matters that the
18 government has sought to protect because of the methodologies
19 used by the government to investigate and prosecute crimes.

20 Do I have that right?

21 MR. CLAYMAN: That's correct, Your Honor. It's an
22 ongoing investigation that the government believes is very
23 sensitive.

24 THE COURT: All right. Now, the matter before the
25 Court today is the question whether there were

1 misrepresentations made to the magistrate judge so as to
2 warrant a *Franks* hearing.

3 So I have your briefs. I have reviewed the briefs,
4 but I do want to hear argument from both of you. I will give
5 you an unfettered opportunity to be heard on that.

6 Mr. Jeffress, you will be heard first.

7 MR. JEFFRESS: Thank you, Your Honor.

8 THE COURT: You're the movant.

9 MR. JEFFRESS: That's right, Your Honor. I thank
10 you. We are here before the Court on our motion to
11 compel further information so that we can meaningfully
12 challenge how the government obtained the search warrant in
13 our motion for a *Franks* hearing. So right now, at this
14 stage, we're requesting further evidence in support of that
15 which we believe is in the government's possession and the
16 government has not denied it's in its possession. And Your
17 Honor, I think to back out as to why --

18 THE COURT: That's not exactly true. You say that
19 the government had evidence that they either knew or directed
20 interference with a computer. They don't admit they have
21 information that shows that.

22 MR. JEFFRESS: Your Honor, I was referring mostly to
23 the first issue, actually, which is the paragraph 23 issue,
24 and whether the tip from the foreign law enforcement agency
25 that they included in that paragraph misled the magistrate,

1 which we think it clearly did, and whether the special agent,
2 when he submitted his affidavit in February of 2020, knew
3 that the reiteration of that tip would mislead the magistrate
4 because --

5 THE COURT: Why would it mislead the magistrate?

6 MR. JEFFRESS: Because, Your Honor, the information
7 in the tip was false. And the government has not -- it
8 was false -- The FLA -- I don't know why -- we're trying to
9 find out why -- but the FLA falsely characterized the state
10 of the evidence that they had. And unfortunately -- and I
11 don't relish saying this -- but it is very clear that the
12 special agent knew that tip falsely --

13 THE COURT: What was false?

14 MR. JEFFRESS: What the tip did was it said that the
15 user, the computer user, which the government believes is
16 Mr. Sanders, had in fact on a specific date, May of 2019,
17 accessed on -- and I want to repeat this exactly -- "accessed
18 on a specific date" -- "the FLA had determined that the user
19 had accessed" -- this is quote -- "accessed online child
20 sexual abuse and exploitation material via a website."

21 That is not what the state of the evidence was. And
22 again, I don't relish saying this, it is very clear to me
23 that the special agent who submitted the affidavit knew that
24 that was a misrepresentation of the --

25 THE COURT: Why was it a misrepresentation?

1 MR. JEFFRESS: Because all the government really
2 had -- and again, on this, Your Honor, the government has not
3 denied this in its opposition. All the government really had
4 at that point was that the computer user had gone to the home
5 page of the website, just the very front page of the website,
6 which itself contains no illegal material whatsoever, and
7 that's it. That's all they had at that time. So it was a --

8 THE COURT: That's all the foreign law enforcement
9 agency had?

10 MR. JEFFRESS: That's all they had, and as a result,
11 that's all the FBI had, yes.

12 THE COURT: All right. And you say that's true
13 because of what?

14 MR. JEFFRESS: A couple of things, Your Honor. We're
15 here on a motion to compel. We're trying to seek further
16 confirmation of this. But just the limited discovery that we
17 have been given to date fully supports this. And there are a
18 couple of different things. One is, is that there is a
19 report done, internal report done by the affiant, the same
20 special agent who submitted the affidavit, it's done
21 three weeks prior to the submission of the affidavit. In
22 that report, which again is an internal report, it's an
23 FD1057, the same agent --

24 THE COURT: Which you have been provided?

25 MR. JEFFRESS: That's right. The same agent -- this

1 is the only document we have involving the affiant other than
2 the affidavit. This is the only thing we've been given so
3 far.

4 In this one document, though, just this one
5 document -- and again, this is the only thing we have to try
6 to determine the agent's state of mind -- what the agent says
7 specifically about what the FLA tip meant was -- again, I
8 want to quote this exactly -- "that the computer user had
9 accessed the website." Just accessed the website. Not that
10 he had registered for the website, not that he had logged
11 into the website, not that he had accessed -- not what is
12 said in the affidavit, which is that he had accessed child
13 -- again, I want to be exact -- "accessed online child sexual
14 abuse and exploitation material via the website." They
15 didn't have that, and he knew that. And that's why --

16 THE COURT: How do you know they didn't have that?

17 MR. JEFFRESS: Well, first, they haven't denied it.
18 They haven't said we're wrong about that. But, secondly --

19 THE COURT: Put that to one side.

20 MR. JEFFRESS: Okay. So he --

21 THE COURT: Why do you think they didn't have that?

22 MR. JEFFRESS: Because the agent in his own
23 description is saying -- it is a much more limited
24 description -- it is saying basically that the user --

25 THE COURT: I think the bottom line is that you don't

1 know.

2 MR. JEFFRESS: This is what we -- this is what we --
3 what we can see from the evidence, this is our judgment about
4 what we can see from the evidence right now. That's correct,
5 Your Honor.

6 THE COURT: So you do have the FBI talking to a
7 foreign law enforcement agency?

8 MR. JEFFRESS: That's right.

9 THE COURT: And you know that the foreign law
10 enforcement agency told him that the defendant accessed this
11 website.

12 MR. JEFFRESS: The foreign law enforcement agency's
13 tip actually said much more than that, but that is one of the
14 things that they said, yes.

15 THE COURT: All right. And you don't have any
16 information as to whether that is false.

17 MR. JEFFRESS: Well, in the FD1057 submitted
18 three weeks before the affidavit, he described it -- the
19 agent described it quite differently. He said that all -- he
20 described it as the computer user just going to the website,
21 merely going to a website, that's it, nothing more. In the
22 affidavit, that's not how it's described. In the affidavit,
23 he repeats the full FLA tip, which misleadingly suggests that
24 the user had actually gone into the website and downloaded or
25 viewed child pornography. They didn't have that, Judge.

1 Look, I'm not God. I don't know for certain --

2 THE COURT: No, you don't know whether they had that
3 or not.

4 MR. JEFFRESS: I don't know, but we strongly suspect
5 based on the state of the evidence that they did not.

6 THE COURT: All right. I think I understand your
7 argument.

8 MR. JEFFRESS: Yes. That is on paragraph 23, Your
9 Honor. So that is the main issue here.

10 Now, then, on paragraph 25 is the second issue, which
11 is the issue Your Honor referred to, which is the use of a
12 -- interference -- [REDACTED] in order
13 to obtain the IP address that the government believes was
14 Mr. Sanders'. As Your Honor pointed out at the beginning,
15 that is an issue of whether [REDACTED] did that. Now -- [REDACTED]
16 [REDACTED] Now, in the paragraph 25, the agent
17 represents that [REDACTED] did not violate its own laws, which
18 may be true --

19 THE COURT: What?

20 MR. JEFFRESS: That they did not violate their own
21 laws, the [REDACTED]

22 THE COURT: All right.

23 MR. JEFFRESS: But then it also says that they did
24 not interfere, access -- again, I want to be precise -- 25
25 says that they did not -- [REDACTED] did not access, search, or

1 seize any data from any computer in the United States in
2 order to obtain that IP address information.

3 Now, both the experts that we've retained so far and
4 talked to and submitted affidavits from, and FBI agents --
5 numerous FBI agents who we have quoted from sworn testimony
6 in this district have said many times that you cannot obtain
7 an IP address on the Tor network without using a technique
8 that would interfere, access, search or -- interfere with,
9 access, search, or seize data from a computer in the United
10 States. The FBI said there is no other way to get this. And
11 that is why --

12 THE COURT: So what if they did?

13 MR. JEFFRESS: Well, they represented that they
14 didn't.

15 THE COURT: What if they did?

16 MR. JEFFRESS: Then, the agent's statement in
17 paragraph 25 is false.

18 THE COURT: Why is it material if it doesn't make a
19 hill of beans?

20 MR. JEFFRESS: On that one, Your Honor, we think it's
21 material for several reasons. First of all, this is how they
22 obtained the information with respect to this IP user. This
23 is the method. And so we think that we should -- we should
24 -- if this is false, then they did use something that
25 interfered with the computer here.

1 THE COURT: [REDACTED] did.

2 MR. JEFFRESS: [REDACTED] did, that's right.

3 THE COURT: What difference does it make?

4 MR. JEFFRESS: Well, I mean, first of all, the agent
5 can't submit a false -- a knowingly false statement in the
6 affidavit.

7 THE COURT: Yes, he can. He can make a mistake. He
8 can be wrong.

9 MR. JEFFRESS: He can be wrong.

10 THE COURT: The question is whether it is material to
11 the issuance of the search warrant.

12 MR. JEFFRESS: Certainly, if he was wrong in good
13 faith, that would be true, Your Honor. But I -- but what the
14 situation here is the FBI well knows that they cannot obtain
15 -- they can't get an IP address like that except by going
16 through an interference equipment technique.

17 THE COURT: What difference does it make if [REDACTED]
18 do that?

19 MR. JEFFRESS: Well, a couple of things.

20 THE COURT: Your colleague wants you to say
21 something.

22 MR. JEFFRESS: A couple of things. First of all, if
23 that was true, [REDACTED] did that without the -- without
24 cooperation from the United States, [REDACTED] then
25 committed -- I mean, that's a criminal offense. That is

1 hacking into Mr. Sanders' computer.

2 THE COURT: So what? That doesn't have anything to
3 do with whether it is material to the issuance of a probable
4 cause determination --

5 MR. JEFFRESS: I would also say --

6 THE COURT: -- if [REDACTED] legal agency or the
7 [REDACTED] law enforcement agency violated their own or our
8 laws.

9 MR. JEFFRESS: I would say if it was -- if it was an
10 innocent mistake that the agent made, then of course Your
11 Honor is correct. But if it was deliberately made, if it was
12 deliberately stated, and he knew it was a reckless disregard
13 or it was just false, then that would -- then that would
14 provide us with the opportunity for a *Franks* hearing.

15 THE COURT: Not if it is not material.

16 MR. JEFFRESS: If you take -- they're the ones that
17 put this in paragraph 25, the agent did. They're the ones
18 that made this statement --

19 THE COURT: I understand that. Answer my question.
20 Why is it material?

21 MR. JEFFRESS: It is also material to the agent's
22 credibility. If he knowingly put that statement in there
23 knowing that it wasn't true, then there are very
24 serious credible -- again, I don't relish saying this.

25 THE COURT: You're aware, are you not, of cases which

1 repeatedly hold that there may be misrepresentations in a
2 search warrant that are not material to the issuance of the
3 warrant.

4 MR. JEFFRESS: That's right.

5 THE COURT: Yes, there was a misrepresentation, but
6 it is not material. So that's why I am asking you
7 repeatedly, why is it material if the foreign legal -- what
8 do you call it? -- foreign law enforcement agency violated
9 their law. Certainly, it doesn't make any difference if they
10 violated their law.

11 MR. JEFFRESS: It doesn't.

12 THE COURT: But violated American law.

13 MR. JEFFRESS: Yeah. I think, like I said, Your
14 Honor, I think it does go to the FBI's credibility if they're
15 making that -- they're the ones who put it in here. They
16 clearly thought it was important. If they're making that
17 statement and they know it's not true, then that is a serious
18 issue that would entitle us to a *Franks* hearing. Maybe
19 nothing else on whether --

20 THE COURT: I'm assuming all of what you say. Why is
21 it material to the issuance of the warrant?

22 MR. JEFFRESS: Because I think the magistrate could
23 have believed, look, did they hack into this person's
24 computer in order to get this information. I think that is
25 why they sort of fronted the issue and said, no, we didn't do

1 that. But that's not true.

2 THE COURT: Let me put it to you this way, because
3 you're starting to get there, but you need to get there
4 directly.

5 MR. JEFFRESS: Thank you, Your Honor.

6 THE COURT: Let's suppose that the magistrate judge
7 concluded that there was a misrepresentation about that. Why
8 would he then not have issued the warrant based on all of the
9 other information?

10 MR. JEFFRESS: I think in part because he would have
11 questioned the agent's credibility at that point. Because
12 the agent is telling him something -- telling him something
13 important --

14 THE COURT: What do you have other than that?

15 MR. JEFFRESS: Other than that, this is the way --
16 this is the method in which they obtained his IP address.
17 And if this isn't true, then I think that casts the whole
18 affidavit into doubt. If it is not true that they -- that
19 their -- the way that they're saying they got his IP
20 address -- that's the whole issue about who this was. And so
21 if that's not true, then we have bigger problems, I think,
22 with respect to the entirety of the affidavit.

23 THE COURT: All right. I think I understand your
24 position. You've also made it quite clear in your briefs.

25 MR. JEFFRESS: Yes. And Your Honor, just on

1 paragraph 23, you know, that is the crux of the affidavit.
2 That is the only incriminating fact in the affidavit. So, on
3 that one, I don't think there is any material issue
4 whatsoever. That is the most material paragraph in the
5 affidavit, and we believe, respectfully, that that statement
6 was knowingly made, either falsely or with reckless disregard
7 of the truth.

8 THE COURT: Let me hear from the government.

9 MR. CLAYMAN: Yes, Your Honor.

10 I know Your Honor has reviewed the briefs and our
11 response brief, so I don't want to spend any time reiterating
12 those arguments, but I do --

13 THE COURT: You better do so if you think it responds
14 to what he said.

15 MR. CLAYMAN: I do want to respond to the reply brief
16 in the arguments today, Your Honor, because I think what the
17 reply briefs and those arguments make clear to the
18 government, at least, is that the issue here is the defendant
19 doesn't think that the FLA's tip provided us sufficient basis
20 for Magistrate Judge Anderson to have issued the warrant.

21 But what the FLA's tip meant or whether it was
22 misleading or how much weight it should have been given,
23 those are all arguments that go to probable cause for a
24 motion to suppress. Those are arguments Magistrate Judge
25 Anderson was able to resolve just through the four corners of

1 the affidavit. Those are arguments that Your Honor would be
2 able to resolve just by looking at the affidavit. These
3 aren't arguments, though, we would argue that should require
4 the government to turn over all e-mails or documents or
5 reports or whatever else the defendant is looking for
6 regarding this tip, because, Your Honor, as we outlined in
7 our response, the tip consisted of basically two key pieces
8 of information. There is this one piece that says an IP
9 address was used to access child sexual abuse material on a
10 website. There is another piece that says the foreign law
11 enforcement agency did not interfere with or search a
12 computer in the U.S. to find out this information.

13 THE COURT: While you're there, though, let me ask
14 you, what do you say to their argument based on their expert
15 report and what's been argued here today that everyone knows
16 you can't get there without interfering?

17 MR. CLAYMAN: So a couple of things, Your Honor. I
18 would note, first, that the declarations that they provided
19 do not state that affirmatively. They suspect that's what
20 happened, and they note that this has happened in the past.
21 But at no point do they say this is the only way they could
22 have obtained this information.

23 Regarding the prior FBI testimony, that is in a
24 completely unrelated matter. That is a matter where the FBI
25 seized a website and then, yes, did use a NIT to send out

1 data to computers in the U.S.

2 The tip we received from the foreign law enforcement
3 agency unequivocally states we did not use a NIT to get into
4 the U.S. computers.

5 THE COURT: And you provided that document to them?

6 MR. CLAYMAN: Yes, they have all the reports that
7 make up the entirety of the tip, which is accurately
8 summarized in the search warrant. So, really, all they're
9 doing is --

10 THE COURT: Tell me this: Let's suppose that the
11 British agency did interfere with a domestic computer to get
12 that information. What, if any, effect does that have on the
13 validity of the issuance of the warrant?

14 MR. CLAYMAN: I'm not sure it would have any, Your
15 Honor. We were told they didn't -- I think -- I would be
16 happy to provide a declaration of our own. But there are
17 ways they could have obtained this information without doing
18 that. [REDACTED] government is a reliable law enforcement
19 agency. We were told they didn't, and we relied on the
20 search warrant. That is the extent of what the report or the
21 tip is, and that is what we put in the search warrant
22 affidavit. Whether [REDACTED] lied to us, we don't know. They
23 said they didn't. And there is really only speculation that
24 they might be lying or that we might know they're lying and
25 therefore we might have something to show that they're lying.

1 This is all just speculation.

2 What we have been told is that they did not do what
3 the defendant is now arguing they did do.

4 THE COURT: Go on.

5 MR. CLAYMAN: Again, I think the proper testimony
6 from the FBI agents they point to, those are from entirely
7 different cases with entirely different sets of facts where
8 there was, in fact, a NIT used. That is not what happened
9 here based on what we have been told.

10 Again, if it would help the Court, I would be happy
11 to provide a declaration of our own explaining again that
12 this is not the only way to obtain this information, so that
13 the defendant's speculation that maybe this is how they did
14 it --

15 THE COURT: Why didn't you do that before? They have
16 a declaration from an expert that says that is the only way
17 you get it.

18 MR. CLAYMAN: I would argue that's not what the
19 declaration says. From my reading, they say this is probably
20 what happened, or this is what happened in the past. But at
21 no point do they say this is how it happened. Because I
22 think they would admit if they were subject to
23 cross-examination here that there are other ways to obtain
24 this information. So all they have provided is one
25 possibility by which the FLA's tip could be completely false,

1 the FBI could have known it was completely false, and that
2 we're hiding this trove of information showing that we know
3 all of this.

4 THE COURT: And I take it you would also argue to me
5 that if you were to disclose these other ways, that would be
6 a breach; that would give, as you see it, the bad guys an
7 opportunity to get around those methods.

8 MR. CLAYMAN: That's correct, Your Honor. We would
9 not like to do that. But if necessary, we are prepared to
10 discuss other ways that TOR users can be identified.

11 THE COURT: Let's say there is a misrepresentation in
12 the affidavit. One of the things they argue is that the FBI
13 knew about it or encouraged it or something, and so that's
14 false. Wouldn't that go to the credibility of the agent on
15 the rest of the affidavit?

16 MR. CLAYMAN: If the idea that the FBI did not know
17 about what the FLA was doing was false?

18 THE COURT: Yes.

19 MR. CLAYMAN: I suppose it would, Your Honor, but we
20 have no -- I can represent we have no e-mail from the FLA
21 showing what we did here is actually a lie, this tip is a
22 lie, but you guys should rely on it anyway. There is no
23 representation like that.

24 THE COURT: Would the misrepresentation that the
25 defendant is arguing for go to every count in the indictment?

1 MR. CLAYMAN: So the search warrant is the
2 evidence -- the search warrant is unrelated to anything he
3 has been charged with. The evidence we found in the search
4 warrant is what the basis for all the charges are. So he
5 hasn't been charged with accessing child sexual abuse
6 material on this TOR site. He has been charged with entirely
7 different conduct related to chats that we uncovered with
8 various minors in which he had them produce child pornography
9 --

10 THE COURT: Would those be fruit of the poisonous
11 tree if there was a violation before?

12 MR. CLAYMAN: I suppose if the motion -- if there was
13 a motion to suppress that was granted, that would present
14 problems for our case-in-chief. But again, I don't think
15 they have provided any actual specific facts to believe that
16 their argument for a *Franks* hearing is valid.

17 THE COURT: All right. Go ahead and finish your
18 argument, please.

19 MR. CLAYMAN: Just the last point I wanted to
20 address, Your Honor, is the defendant's assertion that the
21 tip information stating that the IP address user actually
22 accessed child sexual abuse material is false based on these
23 light distinctions in the way the FBI agent described it at a
24 later point. As we outlined in our response brief, the way
25 he described the tip is not at all inconsistent with the way

1 he described the tip in the search warrant. There is no
2 difference between the user accessed the website versus the
3 user accessed child exploitation material on the website.
4 Because in order to access that child exploitation material,
5 you would have to access the website. Otherwise, Your Honor,
6 unless Your Honor has any specific questions, we would rest
7 on the --

8 THE COURT: Well, they argue that there is both
9 lawful and unlawful material. Why is there anything in the
10 affidavit that says he went for the unlawful information?

11 MR. CLAYMAN: Because that is what the FLA's tip
12 advised us. The tip states he accessed unlawful material.
13 And that's what we relied on in the search warrant, and we
14 represented it, just as it was advised to us, to Judge
15 Anderson. There is no misrepresentation about what the tip
16 said. We did not misquote the tip to Judge Anderson, and
17 they aren't arguing that we did. They are only arguing that
18 we must have known somehow that this tip was false and that
19 it is actually false, which we would argue is not the case.

20 THE COURT: Just a moment.

21 (Pause)

22 THE COURT: The affidavit says that the FLA, the
23 foreign law agency, further advised U.S. law enforcement that
24 the foreign law agency had not interfered with that access,
25 searched, or seized any data from any computer in the United

1 States in order to obtain the IP address information.

2 What do you say to the defendant's argument that
3 that's flatly false? It can't be done, they argue, without
4 interfering with or accessing or searching or seizing data
5 from the U.S. computer?

6 MR. CLAYMAN: Again, Your Honor, that is what the tip
7 advised us. And the information that they point to to
8 suggest that that is just obviously false, in our view, is
9 not sufficient to make that claim. As I noted previously,
10 the declarations they provided do not affirmatively state
11 this is the only way they could have got that information.
12 That is because, I think, any expert on TOR would admit on
13 cross-examination that there are other ways to obtain this
14 sort of information that would be consistent with what the
15 FLA said.

16 THE COURT: Well, as I see what Special Agent Ford
17 averred, it is that the foreign law agency advised the U.S.
18 that the foreign law agency had not interfered with,
19 accessed, searched, or seized any data from any computer in
20 the United States in order to obtain the IP address; and that
21 the U.S. law enforcement personnel did not participate in the
22 investigative work through which the FLA identified the IP
23 address.

24 That's what the affidavit says, isn't it?

25 MR. CLAYMAN: That's correct, Your Honor.

1 THE COURT: And their argument distilled to its
2 essence is that can't be true, it simply can't be. As the
3 expert says, you must do these things. And then the
4 defendant says, so, they either knew about it, which makes it
5 worse, it makes it more of a misrepresentation, or they were
6 acting in reckless disregard by not finding out, or something
7 like that.

8 What is your answer to that argument, that where this
9 affidavit says that they didn't interfere with it and that
10 the FLA did not interfere, search, or access any data from a
11 computer in the United States, and that U.S. law enforcement
12 personnel did not participate in the investigative work? I
13 don't see anything that says that's false. But they have
14 submitted information that suggests that somebody had to
15 interfere with it to get to it.

16 MR. CLAYMAN: Correct, Your Honor. So, again, I
17 would argue that what we put in the search warrant affidavit
18 is essentially a verbatim quote from the tip.

19 THE COURT: From the what?

20 MR. CLAYMAN: From the foreign law enforcement
21 agency's tip. That is almost verbatim what they told us.

22 I would, again, push back on their suggestion that
23 that is a lie because the only way they could have gotten
24 this information is by interfering with a U.S. computer. As
25 I have alluded to, there are other ways this could have

1 happened, that they could have gotten this information, and I
2 don't think their experts --

3 THE COURT: Is their affidavit from an expert, in
4 your view, sufficient or insufficient to warrant the *Franks*
5 hearing, and if not sufficient, why not?

6 MR. CLAYMAN: We think it is insufficient because,
7 again, the expert only speculates this is what happens. He
8 says this is the most likely way it would happen because the
9 FBI did this 5 years ago, so this is what [REDACTED] must have
10 been doing. But he doesn't know what [REDACTED] was doing. And
11 he doesn't say that [REDACTED] could have gotten -- could not
12 have gotten this information from some other way. There are
13 other ways. I could try to articulate them, but they are
14 very technological, so it probably would not make much sense,
15 but there are other ways for this information to have been
16 obtained, and the expert they provided --

17 THE COURT: Been obtained by the foreign law agency?

18 MR. CLAYMAN: Without interfering with a U.S.
19 computer.

20 THE COURT: All right.

21 MR. CLAYMAN: And their expert does not deny that.
22 He just says that the most likely way it happened, in his
23 view, is interfering with a U.S. computer.

24 So we would say that is insufficient for a *Franks*
25 hearing. That is just one way they think this is false.

1 It's just a speculation about why this is false, why the
2 sworn declaration from the agent is false, when we have
3 provided them with the report that shows he's reporting
4 exactly what he was told by the foreign law enforcement
5 agency.

6 THE COURT: And what do you say to the argument made
7 by the defendant's counsel here that, at most, you can say he
8 accessed the site, which had both lawful and unlawful
9 content, but you go on to say in the affidavit that he
10 accessed unlawful content?

11 MR. CLAYMAN: So the information about him accessing
12 unlawful child sexual abuse material is, again, directly from
13 the tip that we have been provided. So that is a direct
14 quote from the foreign law enforcement agency. The special
15 agent didn't restate what the tip said, he didn't add to it
16 or say he accessed certain stuff that we weren't told he
17 accessed. He just directly quoted what the foreign law
18 enforcement agency told the FBI. And they're only
19 speculating now, well, actually, that tip must be false
20 because at another point the FBI agent described it slightly
21 differently, but at a time when he was not swearing out the
22 search warrant. I don't think that provides a basis to
23 conclude that there should be a *Franks* hearing here or that
24 he is entitled to any more discovery than he has already
25 received, which is again the tip that we're relying on.

1 THE COURT: Yes. Outline for me what documents you
2 have already made available to the defendant in this case.

3 MR. CLAYMAN: With respect to what we are here for
4 today, we have provided him with three reports from the
5 foreign law enforcement agency. And those reports make up
6 the entire substance of the tip that we were provided.

7 We have also provided him with substantial
8 information --

9 THE COURT: Is that in Exhibit 1 that you have
10 provided?

11 MR. CLAYMAN: So our Exhibit 1 was the search
12 warrant, but I believe they have attached at least two of the
13 reports to their motion.

14 So their Exhibits 2 and 3 to the motion contain, one,
15 the letter we received from the foreign law enforcement
16 agency saying an IP address was used to access this material.
17 And then Exhibit 3 is a letter explaining that they obtained
18 this information without interfering with a U.S. computer and
19 while still complying with all [REDACTED] laws. And then there is a
20 third report that we have provided that identifies the
21 website by name as the specific website that was used to
22 access the material.

23 THE COURT: Is that in our record, that third report
24 or that third communication?

25 MR. CLAYMAN: It was not attached to our filing.

1 THE COURT: I don't believe it was to theirs, either.

2 MR. CLAYMAN: No, it was not.

3 THE COURT: I want that made a part of our record, as
4 well, because it is part of the information that was provided
5 to the defendant about the tip.

6 Any other information provided about the tip?

7 MR. CLAYMAN: That is the extent of the information
8 about the tip. But that is the extent of the tip. We don't
9 have any more exculpatory information out there about the tip
10 that we're withholding. This is what we were told.

11 We have also provided them substantial information
12 about the post-tip case, the case --

13 THE COURT: You mean after the search?

14 MR. CLAYMAN: Right. With regard to prior to the
15 search, these reports, as well as a report from the agent in
16 which he opened the case and sort of explained what he was
17 told about this tip and why he was opening the case to get a
18 search warrant.

19 THE COURT: And I take it there has also been
20 discovery about what you learned from the search of the
21 defendant's computers and stuff?

22 MR. CLAYMAN: That's correct, Your Honor.

23 THE COURT: And that's what has led to the other
24 counts in the indictment relating to his dealing with young
25 people?

1 MR. CLAYMAN: That's correct, Your Honor.

2 THE COURT: All right. You need to provide this
3 record with that third item.

4 MR. CLAYMAN: We do have a copy here. The defense
5 has a copy we could pass up to the Court, or I could file one
6 under seal on the docket.

7 THE COURT: File one under seal so that it is
8 formally part of the record.

9 Also, let me hear briefly from Mr. Jeffress, and then
10 I'll come back and end up with you, Mr. Clayman.

11 MR. JEFFRESS: Your Honor, so first I would just like
12 to respond on the paragraph 23 issue, which is the one where
13 we believe -- strongly believe -- that the FLA tip that the
14 government reiterated there, you know, was extremely
15 misleading to Magistrate Judge Anderson. Again, that tip is
16 the sole incriminating fact alleged in the entire affidavit.
17 I don't think the government would disagree that that
18 paragraph is the crux of probable cause and that in the
19 absence of that paragraph, there is no possibility that the
20 magistrate would have found probable cause. So it is an
21 extremely important provision of the affidavit paragraph.

22 And I am not hearing the government saying that they
23 do not have information showing that they understood the
24 state of the evidence differently from what they put in this
25 paragraph.

1 Now, what they're saying, instead, is: All we did
2 was repeat what the FLA had said, and we repeated what the
3 FLA had said accurately. That does not make this case fall
4 squarely within *Franks*. And I will just use an analogy to a
5 drug case. Let's say there is an apartment building where
6 certain apartments in the building are known to be where you
7 can purchase or sell drugs. A confidential informant, with a
8 history of liability or whatever, tells the government that,
9 hey, I saw this person, the suspect, go into this apartment
10 building, go to one of the apartments where drugs were sold,
11 buy the drugs, and then I saw him walk out of the building; I
12 saw all of that. The government says, okay, that sounds
13 good, that sounds like probable cause. But then what they
14 find out is that, in fact, all this confidential informant
15 saw was the person walk into this apartment building and walk
16 out of this apartment building, and that's it, that's all
17 they had. They do not comply with their responsibilities if
18 they simply repeat that tip, the full tip from the
19 confidential informant saying he saw him actually buy drugs
20 and then not say that they know for a fact that that tip is
21 false or misleading, because they can't just put that in
22 there and then let it stand and then say, oh, we accurately
23 repeated the tip. That is not what the *Franks* caselaw says.
24 The *Franks* caselaw says that if things are put in the
25 affidavit or omitted from the affidavit in a way to make it

1 materially misleading, the way paragraph 23 is, then that is
2 *Franks*, and we do get a *Franks* hearing in support of that.

3 Now, there are documents -- we have received one
4 document -- again, we have only received two documents that
5 involve Special Agent Ford, who is the affiant. One is the
6 affidavit itself. The second is this 1057 that was
7 submitted -- that was authored -- this internal report from
8 before the affidavit that already shows that he understood
9 the evidence quite differently.

10 The government was also representing during
11 Mr. Sanders' detention hearing that all the evidence -- that
12 what the evidence showed was that this computer user just
13 went to the website, went to the website, not that he
14 downloaded child pornography from there or anything else. So
15 those two statements right there should be enough to get us
16 further discovery.

17 All we're asking for -- and if it doesn't exist,
18 that's fine -- but all we're asking for are whatever e-mails
19 or reports -- other reports show that Special Agent Ford knew
20 when he submitted 23 that he didn't see -- that the FLA --
21 they knew the FLA did not see the person buy the drugs in the
22 apartment where the drugs were sold. All they saw was the
23 person walk into the building and then walk out of the
24 building because that's all they had.

25 And the government has right now -- we believe, we

1 believe -- respectfully submit -- e-mails, you know,
2 correspondence with [REDACTED] showing that Agent Ford knew that
3 that's all he had, and he just can't -- and I understand that
4 he is saying, well, I just accurately repeated the tip in 23,
5 but that is not the point. That is not the point of the
6 *Franks* caselaw. If that paragraph was modified, if they had
7 said, in fact, we don't believe that this IP user actually
8 viewed or downloaded child pornography, we believe this
9 overstates it, there was no probable cause here, we get a
10 *Franks* hearing, and frankly, I think, beyond that, we should
11 get suppression. But what we should get at this stage at
12 least is the information that pertains to this issue --

13 THE COURT: Well, doesn't the tip say that he
14 downloaded child pornography?

15 MR. JEFFRESS: I think it does, yes.

16 THE COURT: And that comes from [REDACTED]

17 MR. JEFFRESS: That comes from [REDACTED]

18 THE COURT: Why wouldn't that be acceptable for them
19 to rely on that?

20 MR. JEFFRESS: Because they didn't -- because all of
21 the other information shows that this was false. First of
22 all, in order to --

23 THE COURT: That [REDACTED] made a false statement to
24 them?

25 MR. JEFFRESS: Well, you know, [REDACTED] were

1 describing -- what was kind of --

2 THE COURT: I'm sorry. Is that what you're saying,
3 that [REDACTED], in their tip to the U.S., lied?

4 MR. JEFFRESS: [REDACTED] were describing --

5 THE COURT: I'm sorry. Yes or no?

6 MR. JEFFRESS: As to this IP user, yes.

7 THE COURT: All right. Go on.

8 MR. JEFFRESS: Yeah. Because what [REDACTED] were
9 describing -- and it took us a while to figure this out --
10 but if you look at the full -- [REDACTED] were describing a
11 bunch of people. They were not describing just this IP
12 address that the government believes is Mr. Sanders. They
13 were describing a whole bunch of IP addresses. This is very
14 preliminary information provided by [REDACTED], like, hey, you
15 might want to look more at these people. So they
16 characterized a number -- we don't know how many because the
17 government hasn't given it to us -- but they were
18 characterizing a number of different IP addresses. Then what
19 Special Agent Ford did was make it appear that [REDACTED] were
20 just supplying information as to this IP address. And that's
21 what sort of led to this confusion in the language. And
22 that's what led to this very misleading use of the language.
23 Because it was supposed to apply to a bunch of people. And
24 in fact, what Special Agent Ford made it seem like is that
25 [REDACTED] are just letting us know about this one person. So

1 I think that's why the language was the way it was, source of
2 confusion. Then trying to use that and say, this is what we
3 had on this one IP user, that's part of what made this so
4 misleading to the magistrate. And you know, I think the
5 government would concede if you excise paragraph 23, or if
6 you qualify it for what the true case was, then there is no
7 probable cause. No neutral and detached magistrate could
8 find probable cause without paragraph 23, because it is the
9 only paragraph that says that this person actually went in
10 and viewed or downloaded child pornography.

11 The other thing, Your Honor, the way this site works,
12 is to get past the home page, which just has innocuous
13 content -- that is the only thing that it has on the home
14 page -- to get past that, you have to actually register, you
15 have to give them your e-mail, and you have to give them a
16 password and stuff, and then you have to go log on, and then
17 you have to go to this next step where you go to these forums
18 and everything, and then you have to download the stuff.
19 Okay. So what they were representing was that he had done
20 all of that when really they knew he just went to this
21 innocuous -- the IP user just went to this innocuous home
22 page. And that makes all the difference.

23 And the government, I think -- what I'm hearing from
24 my colleague, Mr. Clayman, is that, hey, there is really no
25 difference between going to there home page and going all the

1 way to downloading child pornography. Well, that is not a
2 tenable argument. And the only reason the government is
3 making that argument is because they know that they only had
4 him going to the home page.

5 THE COURT: All right. Thank you.

6 MR. JEFFRESS: Thank you.

7 THE COURT: Mr. Clayman.

8 MR. CLAYMAN: Yes, Your Honor.

9 I would just want to reiterate that, under *Franks* and
10 Rule 16, the burden is on the defendant to show that we have
11 this information he is after and that it is in fact material.
12 So while he is making a big deal of the fact that we have not
13 denied it, he actually needs to provide specific facts to
14 indicate that we do in fact have it. And I can represent
15 that right now I am not aware of any e-mail, document, or
16 report in which either the FLA or the FBI acknowledges that
17 the tip is false. I think that's proven because the agent
18 relied on it in the search warrant. He wouldn't be relying
19 on a tip that everyone knew was false.

20 THE COURT: What do you say to his argument that he
21 just made that the tip really was that they only went to the
22 front door, they didn't go in?

23 MR. CLAYMAN: I would say that is contradicted by the
24 face of the tip, which says that they did go in, they did
25 access illegal content.

1 THE COURT: That was the tip.

2 MR. CLAYMAN: Right. His speculation that maybe
3 that's a lie, he needs to provide some basis to believe that,
4 and he hasn't other than pointing to a couple of times we've
5 described the tip using shorter language.

6 THE COURT: All right. I'm going to take the matter
7 under advisement.

8 I'm going to give you each -- I'm thinking -- 10 days
9 to file simultaneous anything further you want to file. I
10 don't think it needs to be one after the other. If you want
11 to say anything more than what's already been said, I will
12 allow you to do it in 10 days in 10 pages or less. In fact,
13 I don't think it needs to be 10 pages. If you haven't said
14 everything you need to say in what you've already filed and
15 what you've had an opportunity to say today, I would be
16 shocked. The only thing that I've heard that is new or
17 different is this additional document that you say that they
18 have that isn't in our record yet, and you've indicated that
19 there are other ways to get to this information, and that the
20 affidavit by the expert on behalf of the defendant is not the
21 only way and there are other ways.

22 All right. I thank counsel for your interesting
23 arguments. I will take the matter under advisement and get
24 to the matter as soon as I can in these trying times.

25 MR. JEFFRESS: Thank you very much, Your Honor.

THE COURT: Thank you.

(Adjourned at 11:46 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

August 7, 2020

PATRICIA A. KANESHIRO-MILLER

DATE